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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 229.

ELIZABETH WRIGHT AND CHARLES C. WRIGHT,
PETITIONERS,
VS.
GUSTA LOGAN, HARRIET LOGAN SAWYER AND
EXIA LOGAN REESE, RESPONDENTS.

ON
WRIT OF CERTIORARI
TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.
CERTIORARI GRANTED OCTOBER 15, 1941.

BRIEF

**On Behalf of the Petitioners,
Elizabeth Wright and Charles C. Wright.**

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**On Behalf of the Petitioners,
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Note: All emphasis in this brief is supplied unless otherwise noted.

OPINIONS BELOW.

In the District Court.

The opinions of the District Court were not published. They are found in the Record at R. 36, f. 60; R. 41, f. 66; R. 44, f. 68, and R. 48, f. 73.

In the Circuit Court of Appeals.

The opinion below in the Seventh Circuit is reported as *Wright* v. *Logan,* 119 F. 2d 354, and it appears at R. 68 to 71.

JURISDICTION.

Certiorari was granted October 15, 1941, jurisdiction being invoked under Section 240 (a) of the Judicial Code; 28 U. S. C. 347 (a).

STATEMENT OF THE CASE.

1. The respondents are the heirs and successors in interest of the original mortgage holder, William S. Logan, now deceased.

2. Following a foreclosure decree in the state court the farm of the petitioners was sold and a certificate of purchase was issued to the mortgage holder Logan (R. 26, f. 43; R. 20, f. 19; R. 27, f. 44).

3. The petitioners originally filed a petition as individual debtors under Section 74 of the Bankruptcy Act. This petition was pending from May 3, 1934, to April 5,

1935 (R. 2, entries of May 3, 1934, to April 5, 1935). The bankruptcy court vacated the reference under Section 74 and granted leave to file a petition as farmer debtors (R. 2, four entries of April 5, 1935. R. 7, f. 5; R. 8, f. 6).

4. The farmer debtors' petition was filed April 5, 1935, under Section 75 (a) to (r) and it was referred to a conciliation commissioner (R. 8, f. 6; R. 2, entries of April 5, 1935). They then had by state law a right of redemption by contract with Logan, the mortgage holder. *Wright* v. *Logan*, 288 Ill. App. 481.

5. The conciliation commissioner made his final report (R. 18, f. 16) stating that there was a "Case pending here in our local court to determine the right of debtors to redeem from W. S. Logan, creditor" (This "case" upon appeal was the decision in *Wright* v. *Logan*, 288 Ill. App. 481, which has just been referred to in the preceding paragraph 3). The conciliation commissioner also stated that the farmer debtors claimed the proceeding was not affected by the decision that the original Frazier-Lemke Law was unconstitutional (Act of June 28, 1934, original Section 75 (s)).

6. The farmer debtors later applied for leave to continue further under Section 75 (a) to (r) to work out a composition or an extension with the mortgage holder Logan (R. 19, f. 18). The application was granted (R. 22, f. 21), and the case was referred back to the conciliation commissioner "for such proceedings as provided under subsection (g) of Section 75 as amended" (R. 23, f. 23). Because the conciliation commissioner was disqualified the reference was vacated and the case was finally referred to Conciliation Commissioner Solon to proceed under Section 75 (a) to (r) for composition or extension (R. 24, f. 24; R. 25, f. 26).

7. While the proceeding was pending before the conciliation commissioner the case in the state courts (re-

ferred to in paragraphs 4 and 5) to determine whether a right of redemption existed was finally decided in *Wright v. Logan*, 288 Ill. App. 481, on January 15, 1937. It was held that the farmer debtors had by contract with the mortgage holder, Logan, the right of redemption. This was long after the farmer debtor petition (R. 8, f. 6), was filed on April 5, 1935.

8. Following the decision of the state court, negotiations for composition or extension proceeded under the reference to the conciliation commissioner. The farmer debtors submitted a formal proposal. Report of Conciliation Commissioner Solon (R. 41 to 43; R. 42, just preceding folio 29).

9. The farmer debtors made numerous efforts to obtain a loan through private agencies and through the State Farm Adjustment Supervisor under the federal Farm Security Administration. The conciliation commissioner reported funds were in sight, with other available funds, sufficient to pay off the Logan mortgage (R. 43). Settlement of practically all debts except the Logan claim was achieved (R. 43, middle of the page). There was more than enough money to pay the Logan mortgage but Logan refused to sign the necessary papers (R. 21, preceding f. 20).

10. The district judge ordered the farmer debtors to pay rent and they paid rent and taxes (R. 4, entry of March 11, 1939, R. 42 and 43, entries of March 21, 1939, March 28, 1939, July 19, 1939, and next to last paragraph on page 43).

11. While the proceeding was pending the master's deed in foreclosure was, without compliance with Section 75 (o), unlawfully delivered to the mortgagee, Logan. The bankruptcy court considered this masters deed to be void. The facts and references to the record relating

to this deed are given in the note below.[1] It was not until March 5, 1940, that the bankruptcy court ordered (in the final order appealed from) that "the deed heretofore issued by the master in chancery be given full force and effect" (R. 48). This order was ineffective because the deed was a nullity. *Kalb v. Feuerstein*, 308 U. S. 433.

12. On January 4, 1939, the heirs of Logan, the mortgage holder, filed their petition in the bankruptcy court that resulted in the final order (R. 48) which is the subject of this petition for certiorari. This petition is found at R. 26 to 30. It prayed:

---

[1]There is in the record an "Order Dissolving Injunction" (R. 17, f. 14). This order referred to a previous order **under Section 74** which was entered May 3, 1934, eleven months before the petition under Section 75 was filed (R. 7, f. 4. R. 8, f. 6). It had no relation to proceedings under Section 75. The bankruptcy court fully recognized that the mortgage remained subject to the farmer debtor proceedings notwithstanding the unlawful delivery of the master's deed as is shown by the following:

On March 11, 1939, the district judge said:

"The deed held by the mortgagees has been retained in their possession under order of this court directing that **it shall not be recorded or given any effect** until and unless this court shall so direct" (R. 39, top of page).

"Apparently they are industrious and thrifty. I desire to save any equity they may have. It would seem that there is no equity in the forty acres, but when it is considered in connection with the seventy acre life estate, the debtors might possibly work out a satisfaction not only of the mortgage but of their other debts so that, there then being no liens against the life estate, they would have a means of livelihood" (R. 39, last sentence of paragraph which continues over from page 38).

"The petitioners have a deed to which the court may at any time give full force and effect. Consequently it is unnecessary to have another sale. But in case this court found it necessary to order a sale, **there would be a period of redemption** of 90 days" (R. 39, the beginning of the first whole paragraph on the page).

"Accordingly it is the order of the court that **the jurisdiction of this court over the deed** held by the petitioners **and over the petitioners be and the same is hereby retained; that the debtors remain in possession and custody of the property. . . .**" (R. 39, beginning at f. 64).

"This matter will be continued for a period of 120 days from this date. During that time **debtors shall have every opportunity to redeem from the mortgage sale** and to make any and all possible adjustments and composition with their creditors" (R. 39, bottom of page).

(1) That the conciliation commissioner be ordered to make a report; (2) That the heirs of the mortgagee be permitted to take possession; (3) Or, in the alternative, that the court fix a sum at which the farmer debtors must redeem. The prayer of this petition is at the bottom of R. 29, and at the top of R. 30.

13. On March 9, 1939, the bankruptcy court heard the petition of the mortgage holders "to determine equity to be done" and ordered the parties to submit a stipulation as to the amount due (R. 4, entry of March 9, 1939).

14. On March 11, 1939, the stipulation was filed that the amount due on the mortgage was $5,560.72 (R. 40). The bankruptcy court also issued an opinion-order (R. 36 to 40), which provided that:

> (1) The farmer debtors should pay rent for past and future (R. 39, f. 64); (2) The cause was continued for 120 days within which the farmer debtors must settle with their creditors (R. 39, bottom of page).

This order was of course invalid because the statute contains no authority for ordering rent to be paid by a farmer debtor while his case is pending as this one was under Section 75 (a) to (r).

15. On January 6, 1940, the bankruptcy court further continued the matter to January 12, and ordered the conciliation commissioner to "file a current report to date," and the conciliation commissioner complied. He concluded his report by saying:

> "I know that Mrs. Wright has been granted a large number of continuances in the above matter for the purpose of effecting the redemption which she is now trying to make, but I feel that **she should be accorded an additional period in which to accomplish the plan which she and Mr. Pace have outlined.** Mrs. Wright has informed me that she has paid the 1938 taxes on the 40 acre and 70 acre tracts.

Your Commissioner further respectfully reports that he now has on hand the sum of $450 which are rental receipts from Elizabeth Wright" (R. 41, at 43).

16. The court further continued the case to March 1, by which date the farmer debtors were ordered to pay the full amount of the judgment debt with interest or surrender possession (R. 5, second entry of January 12, 1940, R. 44).

17. On March 2, 1940, the matter was set for hearing on March 4, 1940 (R. 5, first entry of March 2, 1940). On the same day the farmer debtors filed their amended petition under Section 75 (s) (R. 5, third entry of March 2, 1940).

18. On March 4, 1940, the matter was further heard and taken under advisement (R. 5, entry of March 4, 1940).

19. On March 5, the final order of the bankruptcy court was entered (R. 48). The appeal and this petition for certiorari stem from this final order.

Chronological Table of Events in State and Bankruptcy Courts.

The following chronological table shows the actions of the state and bankruptcy courts. The actions of the state courts are referred to in indented paragraphs.

December 17, 1932	In state court: Decree of Foreclosure (R. 26, f. 43).
February 3, 1933	In state court: Sale in Foreclosure. Certificate of Purchase (R. 20, f. 19; R. 27, f. 44).
May 3, 1934	In bankruptcy court: Petition under Section 74 filed, and referred to referee. R. 2, Date "5-3-34." Restraining order under Section 74, restraining all steps against debtors (R. 7, f. 4).

March 29, 1935 — C. C. A. 7 holds that under Section 74 consent to proposal must be in writing. *Wright* v. *Logan*, 75 F. 2d 687. Discussed at page 14 of this brief.

April 5, 1935 — In bankruptcy court: Petition for leave to file under Section 75. Granted, and petition approved under Section 75 (R. 7, f. 5; R. 8, f. 6, to R. 17, f. 13) and referred to conciliation commissioner.

May 17, 1936 — In bankruptcy court: Report of conciliation commissioner asking for instructions on mortgage holder's motion to dismiss (R. 18, f. 15, paragraph 4).

June 11, 1935 — In bankruptcy court: Injunction under Section 74 (R. 7, f. 4) dissolved (R. 3, f. 1). Date "6-11-35."

July 27, 1935 — In state court: Master's deed dated and delivered to Logan. (Date given in respondents' brief in opposition to Petition for Certiorari, page 16, first full paragraph.) Note: Anent this deed the Judge of the district court said at R. 39 (top of page) on March 11, 1939: "The deed held by the mortgagees has been retained in their possession under order of this court directing that it shall not be recorded or given any effect until and unless this court shall so direct."

September 28, 1935 — In bankruptcy court: Report of conciliation commissioner (R. 18, f. 16) showing:

Case pending in state court on question of right to redeem. Farmer debtors claim *Louis-*

ville v. *Radford* decision does not affect this case as it is not pending under Section 75 (s) but under Section 75 (a) to (r).

September 30, 1935 — In bankruptcy court: Order to amend to Section 75 (s) or show cause within ten days (R. 19, f. 17).

October 9, 1935 — In bankruptcy court: "Amended debtors' petition" (R. 19, f. 18).

NOTE: This was not a petition under Section 75 (s) but for leave to continue further under Section 75 (a) to (r), which was granted in the following entry.

October 14, 1935 — In bankruptcy court: Case retained under Section 75 (a) to (r) and referred to conciliation Commissioner Gross (R. 22, f. 21 and f. 22; R. 23, f. 23).

November 9, 1935 — In bankruptcy court: Reference to Conciliation Commissioner Solon (R. 25, f. 26).

June 17, 1936 — In state court: Decision of Supreme Court of Illinois transferring appeal to Appellate Division because: "The only controversy between the parties was as to the right of redemption." 364 Ill. 33.

January 15, 1937 — In state court: Decree of Appellate Court of Illinois that Debtors had right of redemption. *Wright* v. *Logan*, 288 Ill. App. 481. R. 31, f. 50.

January 4, 1939 — In bankruptcy court: Petition of Logan heirs to dismiss farmer debtor proceedings (R. 26, f. 43).

February 27, 1939	In bankruptcy court: Debtors' answer to Logan Heirs' petition (R. 34, f. 56).
March 9, 1939	In bankruptcy court: Order to debtors and Logan heirs to stipulate amount due (R. 4), entry March 9, 1939.
March 11, 1939	In bankruptcy court: Stipulation between Logan heirs and Wrights showing debt $5,169.50 plus $300 and interest (R. 40, f. 27).
March 11, 1939	In bankruptcy court: Order: 1. Land worth $5,000, debt $5,560.72. 2. Jurisdiction over master's deed retained. 3. Debtors to remain in possession. 4. To pay rental. 5. Continued to 120 days to redeem at amount of mortgage debt (R. 36, f. 60).
July 11, 1939	In bankruptcy court: Time extended 30 days. R. 5, entry July 11, 1939.
August 11, 1939	In bankruptcy court: Time extended 60 days. R. 5, entry August 11, 1939.
January 6, 1940	In bankruptcy court: Hearing set for January 12, 1940. Conciliation commissioner ordered to file current report (R. 41, f. 66).
January 12, 1940	In bankruptcy court: Report of Conciliation Commissioner Solon: 1. Asking for additional time to accomplish plan. 2. Reporting taxes paid and $450 on hand (R. 41, f. 28).
January 12, 1940	In bankruptcy court: Order for possession or pay mortgage debt (R. 44, f. 68).

March 2, 1940 — In bankruptcy court: Hearing set for March 4, 1940. R. 5, entry March 2, 1940.

March 2, 1940 — In bankruptcy court: Amended petition Section 75 (s) filed (R. 47, f. 70). See R. 5, entry "Mch 2-40."

March 4, 1940 — In bankruptcy court: Hearing:

1. On right of possession.
2. On right to file Section 75 (s).

See R. 5, bottom of page, entry dated "Mch 4-40."

March 5, 1940 — In bankruptcy court: Final order:

1. Amended petition Section 75 (s) denied.
2. Restrictions on mortgage holders lifted.
3. Master's deed given full effect.
4. Possession to be surrendered.
5. Farmer debtors' case dismissed.

R. 48, f. 73. R. 6, top of page date "Mch 5."

SPECIFICATION OF ERRORS.

1.

The bankruptcy court could not deny to the farmer debtors the right to file their amended petition under Section 75 (s) upon their failure to achieve composition or extension under Section 75 (a) to (r).

2.

The bankruptcy court could not dismiss the farmer debtor proceeding while the farmer debtors had on file their application for leave to file an amended petition under section 75 (s).

3.

The bankruptcy court could not dismiss the farmer debtor proceeding while the farmer debtors had on file, or were tendering for filing, their amended petition under Section 75 (s).

4.

The bankruptcy court could not give force and effect to a deed delivered in violation of Section 75 (o).

5.

The bankruptcy court could not authorize the mortgage holders to exercise rights as grantees under a deed delivered in violation of Section 75 (o).

6.

The bankruptcy court could not require the farmer debtors to surrender possession of their real estate security while their application for the benefits of Section 75 (s) was pending.

7.

The bankruptcy court could not require the farmer debtors to redeem their mortgaged security while proceedings were pending under Section 75 (a) to (r).

8.

The bankruptcy court could not fix the valuation for purposes of redemption by ordering the parties to stipulate the amount due.

9.

The bankruptcy court could not require the farmer debtors to redeem their mortgaged security by paying the amount for which it sold at a state foreclosure sale.

SUMMARY OF THE ARGUMENT.

The order of the District Court denying the amended petition, lifting all restrictions from the mortgage holders, ordering the real estate to be surrendered, giving effect to the master's deed, and dismissing the proceedings was erroneous, and unlawfully deprived the appellants of the benefits of Section 75 (s):

ARGUMENT.

Preliminary Statement.

Some inaccurate statements appear in the record. It is desired to correct them lest they interfere with a proper understanding of the facts.

1.

It is said in the opinion-order of the bankruptcy court (R. 36 to 40), at R. 36, f. 60, near the bottom of the page and at the top of R. 37, that it had been held, and the United States Circuit Court of Appeals in *Wright* v. *Logan*, 75 F. 2d 685, had affirmed a holding that the farmer debtors had no interest or right in their farm when they filed a petition under Section 74, which preceded the filing under Section 75. The opinion of the Circuit Court disproves this statement. The only issue and the only point decided was that under Section 74 creditors must **consent in writing** to a proposal before the court can confirm it. **The debtors' right in the property was not involved.** We quote in support of this statement the last paragraph of the opinion of the Circuit Court of Appeals:

> "However liberally we are disposed to construe Section 74 with a view of according to debtors the full scope of the relief thereby contemplated, we are not at liberty to ignore its specific requirement that a majority of creditors in amount as well as in number must **consent in writing** to such proposed extension before the bankruptcy court may confirm it." *Wright* v. *Logan*, 75 F. 2d 687.

It is quite clear that the United States Circuit Court of Appeals did not decide anything concerning the debtors' right in the property.

The mortgage holder strenuously argued in the state courts the same contention, that the federal circuit court had decided there was no right of redemption and that the question was *res judicata*. But on January 15, 1937, which was **more than two and a half years after the petition under Section 74 was filed and more than one and a half years after the petition under Section 75 was filed, the Appellate court of Illinois decided that the debtors then still had the right of redemption** by an agreement, with the mortgage holder Logan. This decision, reported as *Wright* v. *Logan*, 288 Ill. App. 481, January 15, 1937, after first finding that the United States Circuit Court of Appeals **had not** made any holding concerning the debtors' interest in the property, then proceeded to decide that they had a right of redemption by agreement with Logan, the mortgage holder, independent of the state statutory period for redemption. The opinion of the state court upon this subject is printed in the Appendix to this brief at page 35.

The bankruptcy court itself never doubted its complete jurisdiction over the mortgaged security. Indeed, it specifically asserted its jurisdiction several times. The following quotations are from various statements made by the judge of the bankruptcy court. (They have been more fully quoted upon another subject in Note 1 at page 5 of this brief.)

> "The deed held by the mortgagees has been retained in their possession under order of this court directing that **it shall not be recorded or given any effect** until and unless this court shall so direct" (R. 39, top of page).
>
> "But in case this court found it necessary to order a sale, **there would be a period of redemption** of 90 days" (R. 39, the beginning of the first whole paragraph of the page).
>
> "Accordingly it is the order of the court that **the jurisdiction of this court over the deed held by the petitioners and over the petitioners be and the same**

is hereby retained; that the debtors remain in possession and custody of the property, . . ." (R. 39, beginning at f. 64).

". . . **debtors shall have every opportunity to redeem** from the mortgage sale and to make any and all possible adjustments and composition with their creditors" (R. 9, bottom of page).

2.

In the opinion-order of March 11, 1939 (R. 36 to 40), it is further said, at R. 37, f. 61, that "Upon expiration of the period of redemption of 15 months, the master-in-chancery executed and delivered to Logan a deed for the read estate." This deed is void because it was executed and delivered while the petition under Section 75 (a) to (r) was pending, and was in violation of Section 75 (o). *Kalb* v. *Feuerstein*, 308 U. S. 433. The bankruptcy court at all times recognized the nullity of this deed and held the deed and the real estate to be subject to the jurisdiction of the bankruptcy court. This has been discussed at page 5 of this brief in Note 1. Also it should be said that the debtors' original right of redemption does not rest upon statute but upon contract. This was finally determined by the decision of the state court in *Wright* v. *Logan*, 288 Ill. App. 481, which is discussed in the preceding heading 1 in this Preliminary Statement at page 14.

3.

The opinion-order of March 11, 1939 (R. 36 to 40), at the bottom of page 38 says of the farmer debtors that "they **have failed to comply with the federal act by paying the usual and customary rental.**" The federal act under which the proceeding was pending (Section 75 (a) (r)) does not require the payment of rental. It is only Section 75 (s) which provides for rental payments and this farmer debtor proceeding has never been under Section 75 (s).

Two Essential Facts.

It is essential to understand clearly two things about this case:

1.

The Proceeding Was Never under Section 75 (s).

It was at all times under Section 75 (a) to (r). No petition under Section 75 (s) was ever filed until March 2, 1940, and then the bankruptcy court denied the right to proceed under it and dismissed the entire case in the final order at R. 48, f. 73, which was the subject of the appeal to the court below.

References to the record which show that the proceeding was never under Section 75 (s):

R. 8, f. 6 — "Debtor's petition" filed April 5, 1935, being the original petition under Section 75 (a) to (r) for composition or extension.

R. 19, f. 18 — Application for leave to continue under Section 75 (a) to (r) filed October 9, 1935.

R. 22, f. 21 — "Order of Approval" entered October 14, 1935.

R. 22, f. 22 — "Order Reinstating Cause, etc." entered October 14, 1935, specifically continuing the proceeding under Section 75 (g) of subsections (a) to (r).

R. 23, f. 23 — "Order Re-Reference" entered October 14, 1935, specifically directing proceeding under Section 75 (a) to (r) for composition or extension.

R. 25, f. 26 — "Order of Re-Reference" entered November 12, 1935, transferring reference to Conciliation Commissioner Solon again specifically referring to proceeding under Section 75 (a) to (r) for composition or extension.

R. 41, f. 28 — "Report of Conciliation Commissioner" filed January 12, 1940, giving the history of the proceeding under Section 75 (a) to (r) for composition or extension.

The only petition under Section 75 (s) ever presented to the court is that at R. 47, f. 70, filed March 2, 1940, which was dismissed in the final order at R. 48, f. 73.

2.

The Bankruptcy Court Itself Kept the Proceeding under Sections 75 (a) to (r).

It was not until March 5, 1940, in the final order appealed from, at R. 48, f. 73, that the court intimated that it considered the proceeding to be under Section 75 (s) for a moratorium instead of under Section 75 (a) to (r). The court there said:

> "The court has at all times treated this proceeding **as if it were under 75S** and has granted to the debtors what is substantially an eight years moratorium, all of which appeared by orders entered March 11, 1939, and January 12, 1940, both of which are incorporated herein by way of reference." Quoted from the final order at R. 48, first paragraph.

References to the record which show that the bankruptcy court had never, prior to the preceding quotation, considered the proceeding to be under Section 75 (s):

R. 22, f. 21 "Order of Approval" entered October 14, 1935, approving the application to continue under Section 75 (a) to (r) for "A composition or an extension of time to pay their debts."

R. 22, f. 22 "Order reinstating cause under Section 75 and for Reference to Conciliation Commissioner to Consider Composition or Extension Agreement." entered October 14, 1935, specifically reinstating the case under Section 75 (g) of subsection (a) to (r).

R. 23, f. 23 "Order of Re-Reference" entered October 14, 1935, specifically referring to proceeding for composition or extension.

R. 25, f. 26 "Order of Re-Reference" entered November 12, 1935, rereferring the proceeding to the new conciliation commissioner and again specifically directing proceeding for composition or extension.

R. 31, f. 21 "Report of Conciliation Commissioner" filed January 12, 1940, showing conduct of the proceeding before the conciliation commissioner and recommending that further time be granted to the farmer debtors to come to a settlement with the mortgage holder. Bottom of R. 43.

R. 44, f. 68 Order granting the creditors' motion and requiring the farmer debtors to pay the mortgage debt in full or surrender possession by March 1, 1940.

R. 4, entry of March 2, 1940 Order, setting case for hearing March 4, 1940.

R. 48 Final order entered March 5, 1940, which was the subject of the appeal to the court below.

The Final Order Examined.

The final order at R. 48, f. 73, contains five separate parts, namely:

1. The amended petition filed under Section 75 (s) was dismissed.

2. The restrictions upon the mortgage holders were lifted.

3. The deed from the master in the state court foreclosure was given full effect.

4. The possession by the farmer debtors was ordered to be surrendered.

5. The farmer debtor proceeding was dismissed.

An attempt to discuss this final order under headings corresponding to its five parts would require considerable duplication of treatment. It will therefore be discussed as a whole.

The Narrow Question.

The narrow question is whether a bankruptcy court may, by its own acts, keep a farmer debtor proceeding under Section 75 (a) to (r) pending under its supervision for a length of time and then decide that it has given to the farmer debtor "the equivalent of proceedings under Section 75 (s)" and deny his statutory right to file an amended petition under Section 75 (s). As late as January 12, 1940; the court itself considered that further time should be extended. Report of conciliation commissioner, R. 41 to 43, at the bottom of page 43: "I feel that she should be accorded an additional period in which to accomplish the plan which she and Mr. Pace have outlined."

If the bankruptcy court may do this then the "mandate of the statute"; the "scheme of the statute"; the "orderly procedure"; the "procedure prescribed by Section 75 (s)"; the "compliance with the procedure required by the statute"; the "orderly administration"; and so forth, so many times by this Court enjoined upon the bankruptcy court have been evaded, and the result "would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate." The foregoing well-known phrases are quoted from the unanimous decisions of this court in *John Hancock* v. *Bartels*, 308 U. S. 180; *Borchard* v. *California Bank*, 310 U. S. 311; and *Wright* v. *Union Central*, 311 U. S. 273.

The Statute Fixes No Time Limit.

It is to be noted that the statute does not prescribe any period of time within which composition or extension under Section 76 (a) to (r) shall be accomplished, or fail-

ing its accomplishment, when the proceeding shall be terminated. Neither does the statute prescribe when an amended petition under Section 75 (s) shall be filed in relation to the original petition. It merely provides in the first sentence of Section 75 (s) that:

> "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

On this very subject it was said in *Cohan* v. *Elder*, (C. C. A. 9) 118 F. 2d 850, certiorari denied 313 U. S. 583, May 26, 1941: "We see no merit in the argument. The statute says nothing about a reasonable time. The act is to be construed liberally to accord the debtor the full measure of the relief afforded by Congress. *Wright* v. *Union Central*, 304 U. S. 502. The situation impelling the debtor to seek an adjudication under subsection (s) may not develop until the plan has been into effect for a substantial time." In that instance two years elapsed between the confirmation of a proposal under Section 75 (a) to (r) and the filing of the amended petition under Section 75 (s).

The Borchard and Wright Dismissals Compared.

The length of time the proceeding was kept pending before the bankruptcy court is immaterial and can not be used by the parties and the bankruptcy court to deprive the farmer debtor of the statutory right to file an amended petition under Section 75 (s). The parties may not resort "to a procedure not contemplated by the statute." *Borchard* v. *California Bank*, 310 U. S. 311, 317. In the Borchard case the length of time was about the same as in this case:

	Petition 75 Filed	Dismissal	From filing to Dismissal
The Borchard Case	November 17, 1934	March 25, 1939	4 years 4 months
This Elizabeth Wright Case	April 25, 1935	March 4, 1940	4 years 10 months

The basic reasoning upon which the bankruptcy court in each case based its order of dismissal in the Borchard case and in this case is essentially the same: (1) the debt is more than the value of the security; (2) the creditors have waited several years; (3) the debtors have had ample opportunity to redeem their security; (4) it is fair and equitable to remove all restrictions from the mortgage holders.

The striking similarity in the reasoning of the two bankruptcy courts is indicated by the following quotations:

1.

Reasons for the Borchard Dismissal.

From the Borchard bankruptcy court reasoning (as recapitulated by this court in *Borchard* v. *California Bank*, 310 U. S. 311, at page 316):

> "The court took testimony as to value and concluded that the real estate was not worth more than $65,000 [the mortgage debt was $89,246]. It found that, as the debtors had had several years within which to arrange an adjustment of their obligations and had been unable so to do, it was fair and equitable that the bank be allowed to proceed so as to save itself further loss. The petition was granted and the outstanding restraining order was dissolved."

2.

Reasons for the Wright Dismissal.

From the opinion-order of March 11, 1939, at R. 36 to 40. R. 38 at the beginning of the paragraph just preceding folio 63:

> "On the undisputed evidence the land is fairly worth $5,000. The total indebtedness represented by the decree of foreclosure, deficiency judgment and the interest and taxes, less such creditors as have been paid, is $5,560.72." . . . R. 39, near the top of the page: "Seven years have passed since entry of the

decree of foreclosure and it is obvious that the creditors have been most reasonable in permitting such a period to elapse without realization of tangible results from the mortgage owned by them." . . . R. 48, second paragraph of the Order of March 5, 1940: "because I am without right or power to deprive the mortgagees of their rights longer, and because the debtor has enjoyed a moratorium far in excess of that provided by the Bankruptcy Act. . ."

It may be assumed that this Wright dismissal was made upon the authority of the Borchard dismissal as the Borchard dismissal was not overruled until two months after the Wright dismissal.

We submit that this order of dismissal calls for the corrective action of this court as it is essentially the Borchard dismissal over again.

The Master's Deed Is Void.

The bankruptcy court could not by its order inject validity into the void deed which was delivered by the master in the state court foreclosure case while a proceeding under Section 75 (a) to (r) was pending. The bankruptcy court itself right up to the final order of March 5, 1940, considered the deed to be invalid. The subject has been presented in Note 1 pages 28-29 of this brief. It was settled by *Kalb* v. *Feuerstein*, 308 U. S. 433.

Applicable Pronouncements of This Court, on the Right of Farmer Debtor to Proceed under Section 75(s).

Finally the following clear pronouncements of this Court are applicable to this case:

"On failure of composition and extension, further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession of his property, under conditions favorable to its ultimate redemption by him. These steps are carried

out under judicial supervision, subsection (s)." *Adair* v. *Bank*, 303 U. S. 350, at page 355.

"Subsection (s) of Section 75 as amended by the Act of August 25, 1935, prescribes a definite course of procedure. That subsection applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts." . . . "He succeeded in obtaining an agreement with certain unsecured creditors for an extension but the secured creditor refused consent, as Bartels could not meet all his arrears. Bartels was thus precisely in the condition prescribed in subsection (s)." . . . "The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s)." . . . "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor while protecting the interests of his creditors by assuring the fair application of whatever property debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton Branch, supra; Adair* v. *Bank of American Association*, 303 U. S. 350, 354, 357; *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502, 516, 517. . . . "We hold that on his amended petition invoking subsection (s) Bartels was entitled to be adjudged a bankrupt and to have his proceeding for relief entertained and his property dealt with in accordance with the subsection." *John Hancock* v. *Bartels*, 308 U. S. 180, at pages 183, 184, 185, 187.

"That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the con-

ditions mentioned in the Act." . . . "For more than thirty-one months after the petition for appraisal was filed no action was taken. An appraisal was thereafter made. No stay order has been entered fixing terms on which the debtors are to remain in possession. The petitioners were entitled to compliance with the procedure required by the statute." *Borchard v. California Bank*, 310 U. S. 311, at page 317.

"And to hold that the court has the discretion to deny or to grant the debtor's right to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable considerations, would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate." *Wright v. Union Central*, 311 U. S. 273, at page 281.

At no time were these farmer debtors given an opportunity to redeem their farm at its appraised value. They were denied that right. They were ordered to pay the amount of the mortgage debt or be dismissed. Their amended petition under Section 75 (s) was dismissed. They have been utterly deprived of their statutory right to invoke the procedure prescribed by Section 75 (s) under their amended petition.

Judicial Amendments to the Farmer Debtor Statute.

The "Equivalent" Theory of Farmer Debtor Administration.

There has grown up in the Seventh Circuit the judicial interpretation that all the farmer debtor is entitled to under Section 75 is the "equivalent" of the provisions of Section 75 (s). We will give four instances of this judicial legislation:

First example: *In re Price*, (C. C. A. 7) 99 F. 2d 691. The farmer debtor petition under Section 75 (a) to (r) for composition or extension was filed September 1, 1936. The amended petition under Section 75 (s) was filed February 2, 1937. The court made the rental and stay period of three years under Section 75 (s) to run from the date of the filing of the original petition. The stat-

ute, Section 75 (s) (2), requires it to run from the date of the stay and rental order following an appraisal after the filing of the amended petition under Section 75 (s) as stated by this court in the first paragraph of its decision in *Wright* v. *Union Central*, 311 U. S. 273.

Second example: Again in *In re Pate*, (C. C. A. 7) 99 F. 2d 694, the rental and stay order was made to run from March 15, when the petition under Section 75 (a) to (r) for composition or extension was filed, instead of from the date of the order on June 25, 1937, under the amended petition filed pursuant to Section 75 (s).

Third example: *In re Monjon*, (C. C. A. 7) 11 F. 2d 535. It was held that although the farmer debtor "has not had the advantage of the procedure prescribed by Section 75 (s) and was entitled to file under it, yet in view of the fact that appellant has already retained possession for over three years" the farmer debtor was denied the three year stay and the district court was directed to order an immediate sale.

Fourth example: So in this Wright proceeding the District Court at R. 48, f. 73, held that the farmer debtors have "enjoyed a moratorium far in excess of that provided" and have "been treated as being within" . . . "Section 75 S." The Circuit Court below in affirming the District Court (*Wright* v. *Logan*, (C. C. A. 7) 119 F. 2d 354) adhered to its "equivalent" theory, saying in the last paragraph of its opinion at R. 71: "We conclude that appellants, who have heretofore had all the benefits to which they could possibly have been entitled under the provisions of Section 75 (s) without filing formal application for such benefits, are not now entitled to obtain a repetition of those same benefits by filing their petition for adjudication in bankruptcy" [under Section 75 (s)].

If the construction and administration of Section 75 long prevailing in the Seventh Circuit (and of which these cases merely exemplify numerous other unreported in-

stances), are to prevail, the effect throughout the nation will be disastrous and will virtually repeal Section 75 (s). Elsewhere the right of a farmer debtor to file his amended petition when the proceeding under Section 75 (a) to (r) for composition or extension is completed, and to have administration as prescribed under Section 75 (s), is recognized as guaranteed by the decision in *John Hancock* v. *Bartels*, 308 U. S. 180; in *Borchard* v. *California*, 310 U. S. 311; and in *Wright* v. *Union Central*, 311 U. S. 273. The "equivalent" theory in practice overrules those decisions of this court.

The "Reasonable Time" Theory of Farmer Debtor Administration.

The Circuit Court below in affirming the district court in this case (*Wright* v. *Logan*, (C. C. A. 7) 119 F. 2d 354) in the last paragraph of its decision found at R. 71, relied upon its judicial "reasonable time" theory, as a companion to the "equivalent" theory. It assumed that the farmer debtors in this case were responsible for the period which elapsed while negotiations were pending for composition or extension under Section 75 (a) to (r). They were not. For nearly two years after the original farmer debtor petition under Section 75 (a) to (r) was filed the mortgage holder was resisting in the state courts the mortgagors' right to redeem under their contract with him. This right was finally determined by the State of Illinois in *Wright* v. *Logan*, 288 Ill. App. 481, decided January 15, 1937. Prior to that the conciliation commissioner in his report of May 16, 1935, at R. 18, f. 15, reported to the court that the mortgage holder filed a motion "asking that said proceeding be dismissed. Said motion is herewith referred to the United States District Court for consideration and instruction." The district court did not dismiss the proceeding. It merely ordered the farmer debtors to file an amended petition under Section 75 (s) or show cause why their original petition under Section 75 (a) to (r) should not be dismissed. R. 19, f. 17. The farmer debtors complied with the show

cause order by requesting leave to continue under Section 75 (a) to (r), setting up the void deed from the master in the state foreclosure action, their verbal contract with the mortgage holder for redemption, and the loan commitment they had received from the Federal Land Bank of "more than enough to pay him" but which he refused. R. 19, f. 18, to R. 21, f. 20.

The bankruptcy court granted the petition for rereference stating in its order that "And it further appearing to the court that said debtors have not had sufficient opportunity to submit to their creditors a proposal of composition or extension as provided in said Section 75," and expressly rereferring the proceeding under Section 75 (a) to (r). R. 22, f. 22; R. 23, f. 23; R. 25, f. 26.

By his report dated January 11, 1940, at R. 41, f. 28, to R. 43, f. 30, at R. 43, the conciliation commissioner recapitulated the negotiations that had been going on. He reported that the farmer debtors had settled with all creditors but mortgage holder Logan with the exception of a $38 claim. That is they had settled $6,500 of scheduled claims. R. 10, f. 8, and R. 17, f. 13. The conciliation commissioner further reported that they had paid the taxes and that he held an additional sum of $450 paid to him by them. The conciliation commissioner on this date of January 11, 1940, said: "I feel that she should be accorded an additional period in which to accomplish the plan which she and Mr. Pace have outlined."

The bankruptcy court then continued to further prolong the proceeding by requiring the farmer debtors to pay the full amount of the mortgage debt, without regard to the value of the security. R. 4, entry of March 9, 1939; R. 40, f. 27; R. 36, f. 60; R. 5, entry of July 11, 1941; R. 5, entry of August 11, 1939; R. 41, f. 66; R. 41, f. 28; R. 44, f. 68; R. 5, entry of March 2, 1940; R. 5, entry of March 4, 1940.

If under such circumstances, after a bankruptcy court has by its own actions kept a farmer debtor proceeding pending under Section 75 (a) to (r), it may terminate it because it declares the farmer debtor has had a "reasonable time" and had had the "equivalent" of what Section 75 (s) provides, the court has, by judicial legislation, enacted a law materially different from the procedure and relief which the legislative branch of the government prescribed. Thereby the judicial branch of the government has amended the Constitution in violation of that instrument which created it and delineated its power.

In the Ninth Circuit, the "reasonable time" and "equivalent" theories were expressly repudiated. In its opinion in *Cohan* v. *Elder*, (C. C. A. 9) 118 F. 2d 850, certiorari denied 313 U. S. 583, May 26, 1941, that court answered the argument that the court was without jurisdiction to grant relief under Section 75 (s) because the amended petition was not filed "within a reasonable time" by saying "the statute (Section 75) says nothing about a reasonable time. The act is to be construed liberally to accord the debtor the full measure of the relief afforded by Congress." The opinion then cited *Wright* v. *Union Central*, 304 U. S. 502, and said further that some time may elapse before the need for Section 75 (s) develops.

Effect of the "Equivalent" and "Reasonable Time" Judicial Theories.

The effect of the "equivalent" and "reasonable time" judicial theories in their practical application upon the farmer debtor is that the law which the Congress has enacted and which this court has sustained in eleven unanimous decisions is repealed. Its importance to the mortgage holders is that, except for some delay, the farmer debtor law is rendered innocuous.

In the manipulation of those theories all the mortgage holder need do is to hold out an encouraging "front" to the farmer debtor permitting him to continue to ap-

pease his secured creditor first by one means, then another, and another, none being quite acceptable to the secured creditor. The unsuspecting farmer debtor is lured on by the express provision of Section 75 (q) which makes it the duty of the conciliation commissioner to assist the farmer debtor from the beginning and provides that in all matters subsequent thereto "farmers shall not be required to be represented by an attorney in any proceeding under this section." All proceedings under bankruptcy legislation are "proceedings in equity" and all bankruptcy courts are "courts of equity." Yet the farmer debtor, trusting in the statute and in the conduct of the parties, finds in the end that he is out of court because he has had the "equivalent" of the Act of Congress and has had a "reasonable" time. The judiciary of the State of Illinois has excoriated such conduct and repudiated similar theories in *Union Central Life Insurance Company* v. *Anderson*, 291 Ill. App. 423.

The Practical Importance of the Question Submitted.

The importance of this case to the petitioners is not the measure of the judicial importance of the issue raised here. There are several millions of farm mortgages within the jurisdiction of this court. Liquidation has considerably reduced their number since Section 75 was enacted, chiefly because Section 75 has been successfully evaded upon one legal theory or another and farm debts were not adequately protected as the congress intended. Farmer debtors ordinarily are unable to finance review of unfavorable decisions and scores of decisions which later were found to be unlawful thus became nevertheless the "law of the case." Laymen farmers cannot understand this. Thousands of farm titles were lost before Section 75 (s) (Act of August 28, 1935) was held constitutional in 1937, in *Wright* v. *Vinton*, 300 U. S. 440. Many more were lost in states having statutory periods of redemption before *Wright* v. *Union Central*, 304 U. S. 502,

held in 1938 that Section 75 (n) is supreme. Others were lost on the grounds of "lack of good faith" and "inability to rehabilitate" (judicially held to be impliedly incorporated in the Act of March 3, 1933, and in the Act of August 28, 1935) before the 1938 decision in *John Hancock* v. *Bartels*, 308 U. S. 180. State courts sold farms out of Section 75 (Act of March 3, 1933) before *Kalb* v. *Feuerstein*, 308 U. S. 433, stopped them in 1940. Many more have been lost along the way on the "reasonable time" and "equivalent" theories until *Borchard* v. *California*, 310 U. S. 311, was decided in 1940. Rights of redemption under Section 75 (s) (3) (Act of August 28, 1935) were lost before the decision in *Wright* v. *Union Central*, 311 U. S. 373, in 1940.

A Last Refuge.

Except for the theory that the definition of a "farmer" in Section 75 was superceded by the Chandler Act, which was rejected in *Benitez* v. *Bank*, 313 U. S. 270, last term, the last refuge for mortgage holders who would destroy the effect of Section 75 would seem to be these "equivalent" and "reasonable time" theories. Notwithstanding this court's eleven unanimous decisions that Section 75 must be administered according to the "mandate of the statute" and its "definite course of procedure" the persistent fault-finding mortgage holders have so far succeeded in thwarting the law. It should be frankly stated that this sorry state of affairs is not primarily due to the fault of the courts but to the misfortune of individual farmer debtors who are unable to secure legal services for the defense of their law. On the other side, the extensive legal staffs of large corporate mortgage holders having mortgages all over the county have been able to secure favorable decisions in one court or another. They have never been able to be so successful where mortgages come within the moratorium statutes relating to corporations (Section 77B), railroads (Section 77), or to municipalities (Section 81 *et seq.*). When confronted with those

laws they submit to the evident purposes embodied in the legislation of the Congress made pursuant to the bankruptcy power of the Constitution.

Nor is the importance of Section 75 to be measured by the number of cases filed under it. For every farmer who invokes it, there are hundreds of others who need not file under it if it is effective. Mortgage holders respect or disregard it in the measure of its effectiveness.

The Decision Below Is Contrary to the General Tenor of Federal Decisions.

1.

The decision below is in conflict with the decision of this court in *John Hancock* v. *Bartels*, 308 U. S. 180. That decision held that a farmer debtor whose petition under Section 75 (a) to (r) has failed to accomplish composition or extension has a right to seek a three year moratorium and redemption of his property from mortgage by invoking Section 75 (s) through an amended petition. The decision below denied that right.

2.

In so far as the decision below may be defended upon the ground of the length of time the proceedings were pending under Section 75 (a) to (r) for composition or extension (said length of time being due to the acts of the court itself), it is in conflict with the decision of this court in *Borchard* v. *California*, 310 U. S. 311.

3.

The decision below is in conflict with the decision of this court in *Kalb* v. *Feuerstein*, 308 U. S. 433, which decided that a deed in foreclosure delivered during the pendency of proceedings under section 75 (a) to (r) is absolutely void, that the grantees in said deed take no right whatsoever, and that their possession pursuant to such deed is unlawful and void.

4.

The decision below is in direct conflict with the decisions of other federal courts.

It is in conflict with the following Circuit Court of Appeals decisions:

Second Circuit:

Federal Land Bank v. *Hansen*, 109 F. 2d 139.

Fifth Circuit:

McCook v. *Federal Land Bank*, 108 F. 2d 185.

Sixth Circuit:

Ellis v. *Connecticut Mutual Life Insurance Company*, 111 F. 2d 896.

Trego v. *Wright*, 111 F. 2d 990.

Schreiver v. *Oxford*, 116 F. 2d 684.

Seventh Circuit:

Zumkehr v. *Steinman*, 108 F. 2d 448.

Eighth Circuit:

Peterson v. *John Hancock*, 116 F. 2d 148.

Ninth Circuit:

Cohan v. *Elder*, 112 F. 2d 967.

Cohan v. *Elder*, 118 F. 2d 850.

Tenth Circuit:

Paradise Land Company v. *Federal Land Bank*, 108 F. 2d 832.

It is in conflict with the following District Court decisions:

District Court of Idaho:

In re Shaw, 35 Fed. Supp. 337.

In re Haun, 35 Fed. Supp. 338.

District Court of Illinois:

In re Storm, Commerce Clearing House, Bankruptcy Law Service, Paragraph 52579.

District Court of New Hampshire:

In re Byrenius, 30 Fed. Supp. 243.

District Court of New York:

In re Williams, Commerce Clearing House, Bankruptcy Law Service, Paragraphs 53225 and 53226.

In re Mahaffey, 34 Fed. Supp. 760.

District Court of Pennsylvania:

In re Kauffman, 38 Fed. Supp. 153.

5.

The decision of the court below is directly in conflict with the decision of another Circuit Court of Appeals on the same subject. *Cohan* v. *Elder*, 118 F. 2d 850 (C. C. A. 9). Certiorari denied in 313 U. S. 583.

Conclusion.

We think this case presents an urgent situation which requires correction. The decisions below are contrary to the spirit of all the eleven unanimous decisions of this court and particularly to those of *John Hancock* v. *Bartels*, 308 U. S. 180; *Borchard* v. *California*, 310 U. S. 311; and *Kalb* v. *Feuerstein*, 308 U. S. 433.

The decisions below are in direct conflict with the decisions in the several circuits whose decisions are cited at pages 33 and 34 of this brief. Particularly it is in conflict with *Cohan* v. *Elder*, (C. C. A. 9) 118 F. 2d 850, to which certiorari was denied by this court in 313 U. S. 583, and also in conflict with those of the several district courts cited at pages 33 and 34 of this brief.

The questions involved concern many hundreds of thousands of farm mortgages.

Respectfully submitted,

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APPENDIX.

Wright v. Logan, 288 Ill. App. 481 Decided January 15, 1937.

(Emphasis is supplied)

That portion of the opinion of this state case which considers the argument advanced by the mortgage holder that the United States Circuit Court of Appeals in *Wright v. Logan*, 75 F. 2d 687, had decided that the mortgagors did not have a right of redemption and that the subject was therefore *res judicata*, reads as follows:

> "Appellee further contends that the doctrine of *res judicata* applies in this case and that the question as to whether or not an oral contract had been entered into between appellee and appellants was decided in the United States Circuit Court of Appeals.
>
> It appears from the record that on the second or third day of May, 1934, plaintiffs herein filed a petition in bankruptcy in the United States District Court for the Eastern District of Illinois and submitted to the bankruptcy court a proposition for a five year extension of the debts pursuant to Section 74 of the Bankruptcy Law. Upon a hearing the referee denied confirmation of the proposed extension, which ruling was confirmed by the District Court. In that proceeding it was necessary for the appellants to have a majority of the creditors in number and amount **consent in writing** to the proposed extension. It was contended by the plaintiffs in the Court of Appeals that defendant Logan had orally consented to an extension of time for the redemption of the property in question and that therefore and thereby he had consented to the proceedings in the bankruptcy court. **Whether or not he had consented to an extension for the time of redemption was not a matter in issue, and was not necessary to a determination of the issues before the federal Court of Appeals.**

Justice Alschuler in his opinion stated, *obiter*, that if Mr. Logan had expressed willingness to take the money due on his mortgage, even if construed to apply to a time after the redemption, it certainly was not the equivalent of his assent to a proposition that, for a period of time which might extend to five years, he would refrain from taking deed to the property.

The bankruptcy proceeding was decided adversely to the plaintiffs. There was only one question involved, namely: Had a majority of the debtors of appellants in number and in amount signed the extension agreement? Whether or not appellants and appellee had entered into an agreement to extend the time of the equity of redemption was not a material issue there; consequently the statement of the court in its opinion, that it did not appear from the evidence that a valid oral agreement had been entered into, could not and does not constitute *res adjudicata* in this proceeding.

> 'To constitute a bar, a former adjudication must have been upon a matter actually at issue, the determination of which was essential to the decree . . . It must conclusively appear that the matter was so at issue that it was necessarily determined by the court rendering the decree which is interposed as a bar,' by reason of such estoppel. *Fineman* v. *Goldberg*, 329 Ill. 507, 511; 161 N. E. 57, 59; *White* v. *Sherman*, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132.
>
> (7) 'A finding of facts not necessary to uphold a former judgment does not conclude the parties. Even though a decree in express terms professes to find a particular fact, yet if such fact was immaterial and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact.' *Hunter* v. *Troup*, 315 Ill. 293, 298; 146 N. E. 321, 322.

The evidence clearly shows that the plaintiffs remained in possession of their farm after the foreclosure and made improvements during the period of redemption with the knowledge and consent of the defendant, relying on their arrangements with the defendant for the extension of the time of redemption.

A doctrine of *res adjudicata* did not preclude them from maintaining their action. The decision is therefore reversed and the cause remanded, with directions that the court ascertain the amount due from the plaintiffs to the defendant; that the plaintiffs be permitted to redeem within a reasonable time to be fixed by the court, and that upon payment thereof, the deed from the master in chancery conveying the premises described in the decree of foreclosure to the defendant be cancelled, and that the defendant, Logan, be required upon such redemption, to reconvey by a proper deed to Elizabeth Wright the title acquired by him to the property through said master's deed and certificate."